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VERSUS [Shuck, Jerry, et al.] DATE DOCKETED: [050191]

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1	May 1 1991	D	Petition for writ of certiorari filed.
2	Jun 3 1991		Brief of respondents Jerry Shuck, et al. in opposition filed.
3	Jun 4 1991		DISTRIBUTED. June 20, 1991
5	Jun 24 1991		REDISTRIBUTED. June 27, 1991
6	Jun 28 1991		Petition DENIED. Dissenting opinion by Justice White with whom Justice Marshall joins. (Detached opinion.)

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90-1671

No. _____

In The

Supreme Court of the United States

October Term, 1990

STELLA HULL,

Petitioner,

vs.

JERRY SHUCK AND GEORGE PLANCE,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I.

Can the intracorporate conspiracy doctrine stand as a bar to a claim brought against public officials, in their personal capacities, for conspiring to deprive a citizen of her right to equal protection of the laws and equal privileges and immunities under the laws, in violation of 42 U.S.C. § 1985(3)?

II.

Does 42 U.S.C. § 1981, as interpreted by this Court in Patterson v. McLean Credit Union, 109 S. Ct. 2363 (1989), prohibit an employer from refusing, on racial grounds, to renew a contract of employment with an employee upon the expiration of her existing contract, which is of a fixed and limited duration?

PARTIES IN THE COURT BELOW

Plaintiff

Stella Hull

Defendants

Board of Education for the Cuyahoga Valley Joint Vocational School District

Jerry Shuck

George Plance

Gary Romes

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1990

STELLA HULL,

Petitioner,

vs.

JERRY SHUCK AND GEORGE PLANCE,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioner Stella Hull prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit, which held that her civil rights claims brought under 42 U.S.C. § 1981 and 42 U.S.C. § 1985(3) were barred as a matter of law.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit is reported at 926 F.2d 505 and set forth in the Appendix at A1-A22. The unreported memorandum of opinion of the District Court for the Northern District of Ohio is set forth at A23-A52. The unreported order of the District Court granting respondents' motion for summary judgment is set forth at A53. The unreported order of the Sixth Circuit denying the petition for rehearing is set forth at A54.

JURISDICTION

The decision of the Sixth Circuit Court of Appeals was filed on February 15, 1991. Petitioner timely filed a petition for rehearing, which was denied on March 20, 1991. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The constitutional provisions involved are the Thirteenth Amendment to the Constitution and the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the Constitution. The federal statutory provisions involved are 42 U.S.C. §§ 1981, 1983 and 1985(3). The state statutory provisions involved are Ohio Rev. Code §§ 3319.08 and 3319.11. The foregoing constitutional and statutory provisions are set forth in the Appendix at A55-A71.

STATEMENT OF THE CASE

This case seeks review of the decision of the Court of Appeals for the Sixth Circuit which held, inter alia, that the intracorporate conspiracy doctrine barred petitioner from maintaining a cause of action under 42 U.S.C.

§ 1985(3) against respondents, in their individual capacities, for conspiring to deprive her of her constitutional and civil rights. This petition also seeks review of the Court of Appeals' holding that respondents' conduct -- inducing petitioner's employer, a school board, not to enter into a new contract of employment with petitioner because of her race upon the expiration of her existing contract of employment -- was not actionable under 42 U.S.C. § 1981.

As to the first question presented, this case squarely presents the Court with the opportunity to resolve the long-standing conflict among the circuit courts of appeals as to whether public officials, who, acting with racial animus, agree to embark upon a course of conduct to violate the civil rights of a subordinate employee and succeed in doing so, may wield the fact they are employed

by the same public entity as a shield to avoid the imposition of conspiratorial liability.

This case also provides the Court with the opportunity to amplify and clarify what constitutes a "new and distinct contractual relationship" within the meaning of 42 U.S.C. § 1981, and to address whether, in fact, that mode of analysis is appropriate where a § 1981 claim is predicated upon the refusal to renew a contract that is about to expire.

On August 23, 1989, petitioner Stella Hull, who is black, filed an amended complaint in the District Court for the Northern District of Ohio that charged respondents Jerry Shuck and George Plance, the superintendent and executive director, respectively, of the Cuyahoga Valley Joint Vocational School District ("District"), in their personal and official capacities, the Cuyahoga

Valley Joint Vocational School District Board of Education ("school board"), its members, and another administrator, Gary Romes, with depriving her of her rights to equal protection and due process of law, and of her right to make and enforce contracts on the same terms as white citizens, in violation of 42 U.S.C. §§ 1981 and 1983.[1/] She further charged that respondents Shuck and Plance, and others, conspired to deprive her of those rights in violation of 42 U.S.C. § 1985(3). Jurisdiction was conferred upon the district court by 28 U.S.C. §§ 1331 and 1343. See U.S. Dist. Ct. Mem. of Opinion at 1; App. at A24.

1/ Petitioner dismissed the school board members in their individual capacities from this action. Further, petitioner is not seeking review of the appellate court's disposition of her claims against the school board and Mr. Romes.

Specifically, in December 1982, petitioner was hired under a limited contract, that is, as an untenured teacher, by the school board to teach a course in word processing enrichment. Opinion at 2; App. at A2.[2/] At the conclusion of that school year and of the three subsequent school years, the school board offered Mrs. Hull a new, one-year limited contract for the next school year, each of which petitioner accepted.

In the spring of 1987, as they had done in the past, respondents Shuck and Plance met privately to determine which limited contract teachers would be offered contracts for the following school year. Opinion at 18 n.4; App. at A18 n.4. At that meeting, they decided respondent Shuck would recommend to the

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2/ "Opinion" refers to the opinion of the Court of Appeals for the Sixth Circuit.

school board that petitioner not be extended a contract for the next year.

Shortly before Shuck made his recommendation to the school board, he and petitioner met, at petitioner's request, because petitioner was concerned about her job status for the next year. At that meeting, respondent Shuck told petitioner he was going to recommend that her contract not be renewed. When queried by petitioner for the reason underlying his decision, he told her that "she did not fit in" and did not "make a good match with the district." Indeed, he told Stella Hull that he could not discuss her situation further for legal reasons, and by his own admission, told petitioner that her questions made him feel uncomfortable. Opinion at 14; App. at A14.

Shuck utterly failed to tell petitioner during their meeting his later proffered reason for his decision -- that

the enrichment course she taught was to be eliminated from the curriculum. Although Shuck asserted that excuse in support of his motion for summary judgment, "the minutes of the Board of Education's April 15, 1987 meeting," the date on which the school board voted not to extend a contract to petitioner, "indicated that an 'enrichment' position was open for the following year." Opinion at 14-15; App. at A14-A15.

That respondents' decision was free from bias and racial animus was further cast into doubt by a comment made by respondent Plance at about the time of his meeting with Shuck. Specifically, respondent Plance communicated to William Jones, another district administrator, that petitioner and another black employee "were a couple of dumb niggers" and the district "was going to get rid of them." Opinion at 15; App. at A15.

It is undisputed that respondents Shuck and Plance met to decide whether petitioner's contract was to be renewed for the following year; that they decided at that meeting to recommend that petitioner's teaching contract not be renewed; and, based upon that recommendation, the school board did not offer her a contract.

Although no claim had been alleged that the school board or its members were part of the conspiracy, see Amended Complaint, ¶¶ 30-32, and although the court below held that there was sufficient evidence in the record to raise a genuine issue relating to respondents' discriminatory intent so as to strip them of a qualified immunity defense, it also held respondents were insulated from liability, in their individual capacities, for conspiring to deprive petitioner of her civil and constitutional

rights because respondents were both employees of the school board. Opinion at 7-8; App. at A7-A8.

The court further held that the school board's refusal to re-employ petitioner upon the expiration of her limited teaching contract for the 1986-87 school year, based on Shuck's recommendation, was a "discharge," and thus, not actionable under 42 U.S.C. § 1981. Opinion at 5-6; App. at A5-A6.

Because of the substantial issues which these holdings raise, petitioner now seeks review in this Court.

REASONS FOR GRANTING THE WRIT

I. AN IMPORTANT QUESTION IS PRESENTED, ON WHICH THE CIRCUIT COURTS OF APPEALS ARE DIVIDED, AS TO WHETHER THE INTRACORPORATE CONSPIRACY DOCTRINE CAN STAND AS A BAR TO A CLAIM BROUGHT AGAINST PUBLIC OFFICIALS, IN THEIR PERSONAL CAPACITIES, FOR CONSPIRING TO DEPRIVE A CITIZEN OF HER RIGHT TO EQUAL PROTECTION OF THE LAWS, IN VIOLATION OF 42 U.S.C. § 1985(3).

This Court has long recognized that

the civil rights laws were designed to root out the vestiges of discrimination, guarantee equal treatment to all citizens and provide a remedy to those whose rights have been violated. See, e.g., Shaare Tefila Congregation v. Cobb, 481 U.S. 615 (1987); Runyon v. McCrary, 427 U.S. 160 (1976); Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968). "The law now reflects society's consensus that discrimination based on the color of one's skin is a profound wrong of tragic dimension." Patterson v. McLean Credit Union, 109 S. Ct. 2363, 2379 (1989). And that wrong is magnified when the party acting with discriminatory animus is a public official.

However, a public official's unlawful and discriminatory conduct, standing alone, will not subject his employing entity to liability. City of St. Louis v. Praprotnik, 485 U.S. 112 (1988); Pembaur v. City of Cincinnati, 475 U.S.

469 (1986); Monell v. New York City Dept. of Social Services, 436 U.S. 658 (1978). Such conduct does, however, subject the official to personal liability.

Indeed, in Kentucky v. Graham, 473 U.S. 159 (1985), this Court specifically recognized the distinction between personal capacity suits against public officials and official capacity suits. It observed, "Personal capacity suits seek to impose personal liability upon a government official for actions he [took] under color of state law," which "caused the deprivation of a federal right." Id. at 165, 166. In contrast to personal capacity suits, official capacity suits, this Court observed, were simply a different method of pleading a claim against a public entity. Id.

In the present case, however, the court below failed to account for these

differences and held that because respondents both were employed by the school board they were immunized by the intracorporate conspiracy doctrine from personal liability on petitioner's claim brought under 42 U.S.C. § 1985(3). What is more, it reached that conclusion in spite of also concluding that respondents could not maintain a defense of qualified immunity because there was sufficient evidence of discriminatory animus to warrant a trial against them. Opinion at 13-18; App. at A13-A18.

Indeed, the opinion reveals that the court's application of the intracorporate conspiracy doctrine was predicated upon principles of respondeat superior. In addressing respondents' liability under the statute, the court first observed, "A corporation cannot conspire with itself any more than a private individual can, and it is the general rule that the acts

of the agent are the acts of the corporation." Opinion at 7; App. at A7 (quoting Nelson Radio & Supply Co., Inc. v. Motorola, Inc., 200 F.2d 911, 914 (5th Cir. 1952), cert. denied, 345 U.S. 925 (1953).

Based on that rationale, which so clearly relies on principles of imputed liability, the court concluded, "Since all of the defendants are members of the same collective entity, there are not two separate 'people' to form a conspiracy.... The district court's grant of defendants' motion for summary judgment on the § 1985(3) claim is hereby affirmed on this ground." Opinion at 8; App. at A8.

The court's application of the intracorporate conspiracy doctrine to shield respondents from liability in their individual capacities stands the Monell doctrine, which protects public

bodies from imputed liability, on its head. Under the Sixth Circuit's reasoning, individual defendants become shielded from conspiratorial liability solely because they are employed by the same entity, irrespective of the personal discriminatory animus they possess and upon which they act.

The result in this case is all the more astonishing because the appellate court concluded not only that respondents could not maintain a defense of "good faith" or qualified immunity, but that they were not final policymakers whose unconstitutional acts could subject the school board to liability in the first instance. Opinion at ~~19-21; App. at~~ A19-A21.

By applying the intracorporate conspiracy doctrine to bar petitioner's cause of action, the court below aligned itself with the Second, Fourth and

Seventh Circuits, which apply the intracorporate conspiracy doctrine to civil rights actions. See, e.g., Herrmann v. Moore, 576 F.2d 453, 459 (2d Cir.), cert. denied, 439 U.S. 1003 (1978); Buschi v. Kirven, 775 F.2d 1240, 1251-53, (4th Cir. 1985); Dombrowski v. Dowling, 459 F.2d 190 (7th Cir. 1972). But cf. Travis v. Gary Comm. Mental Health Center, 921 F.2d 108, 110 (7th Cir. 1990) (rejecting an exception to doctrine where multiple steps to carry out discriminatory act are alleged, but recognizing that "corporate officers are answerable for their own crimes and torts.").

The First, Third, Fifth and Eleventh Circuits, on the other hand, have refused to extend the defense beyond the federal antitrust areas in which it had its genesis. See, e.g., Stathos v. Bowden, 728 F.2d 15, 20-21 (1st Cir. 1984); Navotny v. Great Am. Fed. Savings & Loan Assn.,

584 F.2d 1235, 1256-59 (3d Cir. 1978) (en banc), vacated on other grounds, 442 U.S. 366 (1979); Dussouy v. Gulf Coast Investment Corp., 660 F.2d 594 (5th Cir. 1981); United States v. Hartley, 678 F.2d 961, 970-72 (11th Cir. 1982), cert. denied, 459 U.S. 1170 (1983).

The Eighth Circuit has taken a middle position. A claim under § 1985(3) may be established where individuals, in addition to the corporate entity, are named as defendants and those individuals act for personal reasons outside the scope of their employment. Cross v. General Motors Corp., 721 F.2d 1152, 1156 (8th Cir. 1983), cert. denied, 466 U.S. 980 (1984); Garza v. City of Omaha, 814 F.2d 553, 556-67 (8th Cir. 1987).

The Ninth Circuit reserved ruling on the issue in Padway v. Palches, 665 F.2d 965, 968-69 (9th Cir. 1982), and has not revisited it. District courts within the

Ninth Circuit, however, recently have refused to allow the intracorporate conspiracy defense in civil rights actions. See, e.g., Rebel Van Lines v. City of Compton, 663 F. Supp. 786 (C.D. Cal. 1987); Washington v. Duty Free Shoppers, 696 F. Supp. 1323 (N.D. Cal. 1988).

The Tenth Circuit has also not yet addressed the issue, but district courts in the Tenth Circuit have determined the applicability of the doctrine on a case-by-case basis and have arrived at different outcomes. See, e.g., Rivas v. State Bd. for Comm. Colleges and Occ. Ed., 517 F. Supp. 467 (D. Colo. 1981) (claim of single discriminatory decision made by two or more of an entity's employees, where employees acted within scope of employment, barred by intracorporate conspiracy doctrine); Roybal v. City of Albuquerque, 653 F. Supp. 102 (D. N. M. 1986) (section 1985(3) claim not avail-

able against officials acting in their official capacity); Mason v. Twenty-Sixth Jud. Dist. of Kansas, 670 F. Supp. 1528, 1534 (D. Kan. 1987) (refusing to apply doctrine where conspiracy alleged among employees of single entity acting in their individual capacities was racially motivated).

Thus, based upon the entirety of the Sixth Circuit's opinion, petitioner would have been able to maintain her cause of action in the First, Third, Fifth and Eleventh Circuits, as well as in various districts in the Ninth and Tenth Circuits. The Sixth Circuit, however, extinguished it outright.

In Copperweld Corporation v. Independence Tube Corporation, 467 U.S. 752, 775 n.24 (1984), this Court expressly noted the division among the circuits as to whether employees of a single entity could conspire for purposes

of 42 U.S.C. § 1985(3). And, in Navotny v. Great American Federal Savings & Loan Association, 442 U.S. 366, 372 n.11 (1979), the Court assumed, but did not decide, that a conspiracy entered into by the bank's officers to deprive plaintiff of his civil rights was properly charged.

"[T]he predominant purpose of § 1985(3) was to combat the prevalent animus against Negroes and their supporters." United Brotherhood of Carpenters & Joiners v. Scott, 463 U.S. 825, 836 (1983). The decision below, and those of other circuits which recognize the intracorporate conspiracy defense in civil rights actions, stand diametrically opposed to that ideal and substantially nullify the statute whose very design was to eradicate discriminatory conduct.

A decision from this Court which resolves the longstanding schism on this issue is needed to achieve uniform

enforcement of civil rights laws among the circuits. Because of the significance and importance of this issue, this petition should be granted.

II. AN IMPORTANT QUESTION IS PRESENTED AS TO WHETHER 42 U.S.C. § 1981, AS INTERPRETED BY THIS COURT IN **PATTERSON v. McLEAN CREDIT UNION**, 109 S. CT. 2363 (1989), PROHIBITS AN EMPLOYER FROM REFUSING, ON RACIAL GROUNDS, TO RENEW A CONTRACT OF EMPLOYMENT WITH AN EMPLOYEE UPON THE EXPIRATION OF HER EXISTING CONTRACT, WHICH IS OF A FIXED AND LIMITED DURATION.

As was observed above, petitioner was employed by the school board under a series of one year contracts as a limited contract, or untenured, teacher. Each year, the school board followed the procedure required by Ohio law and re-employed petitioner for the ensuing school year under another one-year teaching contract, until April 1987, when, based on respondent Shuck's recommendation, it voted not to extend a contract to her for the 1987-88 school year.

Under Ohio law, school boards are required to employ teachers pursuant to written contracts. Ohio Rev. Code § 3319.08; App. at A62. A limited contract is one that may extend for any period of time, not to exceed five years. Id.; App. at A64.

Upon the expiration of a limited teaching contract, the provisions of Ohio Rev. Code § 3319.11 come into play. That statute provides, in relevant part:

> Any teacher employed under a limited contract...is, at the expiration of such limited contract, deemed re-employed under the provisions of this section at the same salary plus any increment provided by the salary schedule unless the employing board, acting on the superintendent's recommendation as to whether or not the teacher should be re-employed, gives such teacher written notice.... Such teacher is presumed to have accepted such employment unless he notifies the board to the contrary...and a written contract shall be executed accordingly. The failure of the parties to execute a written contract shall not void the automatic re-employment of such teacher.

> The failure of a superintendent of schools to make a recommendation...shall not prejudice or prevent a teacher from being deemed re-employed....

Id. (emphasis added); App. at A70-A71.[3]

Thus, the statute sets forth the obligations of the school board and a limited contract teacher in classic contract formation language. When a limited contract expires, if the board takes no action, by operation of law, the teacher is automatically "deemed re-employed." Re-employment does not occur under an extension of the old contract. Rather, a new, written contract is mandated. The statute further provides that a teacher is presumed to have accepted the new offer of employment unless notice to the contrary is given to the board by a date certain.

Both the court of appeals and the district court below held that petitioner could not maintain her action under 42 U.S.C. § 1981, because the school board's refusal to enter into a new limited teaching contract for the subsequent school year was construed by those courts to be a "discharge," and thus, did not survive this Court's decision in Patterson v. McLean Credit Union, 109 S. Ct. 2363 (1989).[4] Opinion at 5-6; App. at A5-A6; Dist. Ct. Mem. of Opinion 6-7; App. at A34-A37.

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[3] Ohio Rev. Code § 3319.11 was amended in 1988, however, the amended statute still retains the features applicable to the case at bar. See Opinion at 6 n.2; App. at A6 n.2.

[4] The impact of the Sixth Circuit's analysis is not confined to Ohio teachers. Kentucky, Michigan and Tennessee have similar laws. See Ky. Rev. State. § 161.750; Mich. Stat. Ann. § 15.1983; Tenn. Code Ann. § 49-5-409. See also Ala. Code § 16-24-12; Ariz. Rev. Stat. § 15-536; Colo. Rev. Stat. § 22-63-110; Conn. Gen. Stat. § 10-151.

In the context of promotions, this Court expressly held in Patterson that if "a new and distinct relation between the employer and employee" would be created by the promotion, the failure to promote would violate § 1981 if that failure were based on race. Id. at 2377. In the case of a refusal to hire, it is clear that the "new and distinct relation" test -- by definition -- is met when an employer refuses to enter into a new contract of employment with an employee upon the expiration of the existing contract.

Indeed, that is the precise conduct prohibited by § 1981, and is completely different than a promotion, for, where the employer-employee relationship continues, a comparison of two positions may be required to ascertain whether the making of a contract is involved. That analysis is unnecessary where it is the refusal to enter into a contract that is

at issue.

Patterson makes clear that it is the contractual relationship between the parties that is relevant, not the employment relationship. Ohio law and the laws of other states clearly and unambiguously provide that while a limited contract teacher's employment may continue after the expiration of a contract, further employment is under a new agreement.[5/]

Because of the substantial impact the court's decision will have on statu-

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5/ Construing Indiana's statute relating to contracting with non-tenured teachers, Ind. Code Ann. § 20-6.1-4-14, the Indiana Court of Appeals held, "[T]he non-permanent teacher's contract rights exist only with regard to the contract entered into for the present school year.... [W]here no right to re-employment exists for succeeding years, the decision not to continue a non-permanent teacher's contract is merely a determination not to re-employ the teacher." Aplin v. Porter School Twp. of Porter County, 413 E.2d 999, 1003 (Ind. App. 1980).

tory rights granted to teachers by the various state legislatures, as well as upon other contractual relationships which provide for contract renewal, a statement from this Court which clarifies the breadth of § 1981's protections is needed. For the above-stated reasons, this petition should be granted.

CONCLUSION

For all of the foregoing reasons, petitioner prays that this Court grant the petition for a writ of certiorari and review this case.

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RECOMMENDED FOR FULL TEXT PUBLICATION
Pursuant to Sixth Circuit Rule 24

No. 90-3360

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

STELLA HULL,
Plaintiff-Appellant,

v.

CUYAHOGA VALLEY JOINT VOCATIONAL SCHOOL DISTRICT BOARD OF EDUCATION, et al.,
Defendants-Appellees.

ON APPEAL from the United States District Court for the Northern District of Ohio

Decided and Filed February 15, 1991

Before: KEITH and MILBURN, Circuit Judges; and CONTIE, Senior Circuit Judge.

CONTIE, Senior Circuit Judge. Plaintiff-appellant, Stella Hull, appeals the district court's grant of summary judgment to defendants-appellees, the Cuyahoga Valley Joint Vocational School District Board of Education, its superintendent, Jerry Schuck, its executive director, George Plance, and a school administrator, Gary Romes, for violation of 42 U.S.C. §§1981, 1983, and 1985(3). For the following reasons, the judgment of the district court is affirmed in part and reversed in part.

I

I.

From December 1982 until the end of the 1986-87 school year, plaintiff-appellant, Stella Hull, was employed by defendant-appellee, the Cuyahoga Valley Joint Vocational School District Board of Education [hereinafter, the "Board"] under a limited (non-tenured) contract. The Board is a public body authorized by statute to manage the Cuyahoga Valley Joint Vocational School [hereinafter, "Cuyahoga Valley" or the "school"] where plaintiff worked. The three individual defendants are: Jerry Schuck, superintendent of the Cuyahoga Valley Joint Vocational School District [hereinafter, the "district"]; George Plance, executive director of the district; and Gary Romes, a vocational supervisor at the school.

In 1982, plaintiff, a black female, was hired to teach word processing enrichment to "home school students," high school students from the joint vocational school's constituent districts who did not attend the vocational school. Concerned that the program would be short-lived, plaintiff applied to teach the junior data processing course and the medical secretary course. Her applications for reassignment to regular classroom positions were denied by defendant Plance, the executive director of the district. When she was not hired for a regular classroom teaching position, plaintiff continued to teach the word processing enrichment course for the next two school years. In 1985, plaintiff applied for and was reassigned to teach a new course, Advanced Business Technology [hereinafter, "ABT"]. Romes, a vocational supervisor at the school, evaluated Hull's teaching performance as the ABT instructor, found it to be unsatisfactory, and recommended reassignment.

Plance, who was in charge of personnel, reassigned Hull to the word processing enrichment program for the 1986-87 school year. In February 1987, Hull met with defendant Plance, who told her that the enrichment program might be abolished the following school year.

On April 5, 1987, Hull met at her request with defendant Schuck, the district superintendent who makes recommendations to the Board on the renewal or non-renewal of teaching contracts. In response to Hull's inquiry about her employment status for the following year, Schuck told her that he would recommend to the Board that it not renew her contract. When Hull asked the reasons, Schuck responded that "he could not discuss [the decision] for legal reasons." Schuck also told plaintiff that she "had not found a good match for the district," "had not found her niche," and "did not fit in." When asked what he meant by those remarks, Schuck told Mrs. Hull that she was making him feel uncomfortable.

After plaintiff received written notice from Schuck about his recommendation to the Board, Mrs. Hull began telephoning school board members. She reached five of the ten members and explained her situation to them, although she did not state that she believed her contract was being non-renewed because she was black. Several Board members asked Mrs. Hull to supply them with material and one said he would look into possible racial discrimination. On April 15, 1987, acting upon Schuck's recommendation, the Board voted unanimously not to renew plaintiff's teaching contract for the 1987-88 school year.

On April 5, 1989, plaintiff filed a complaint against the Board, the ten Board members, Jerry Schuck, the district superintendent, George Plance, the executive director, and Gary Romes, a school supervisor. In an amended complaint filed August 23, 1989, plaintiff alleged that defendants-appellees discriminated against her because of her race. Counts one, two, and three of the amended complaint alleged racial discrimination in violation of 42 U.S.C. §1981. Counts four and five alleged the same in violation of 42 U.S.C. §1983. Count six alleged a racially motivated conspiracy between defendants Schuck, Plance and Romes in violation of 42 U.S.C. §1985(3). Count seven alleged a pendent state claim of tortious interference with an employment contract. The individual defendants, Schuck, Plance, Romes and the Board

members, were sued in both their personal and official capacities.[1]

Hull alleged that during her employment, defendants Schuck, Plance and Romes discriminated against her because of race in the following ways:

> Prior to 1985, Hull was denied the opportunity to teach regular classroom courses involving secretarial work and data processing;
>
> In 1985, Romes refused to excuse Hull from cafeteria duty;
>
> Romes unfavorably evaluated Hull's teaching performance as the ABT course instructor and she was then reassigned to another course, while a white teacher was assigned to teach ABT;
>
> In the spring of 1987, Plance referred to Hull in a racially derogatory manner and said the district would get rid of her;
>
> In the last five days of school in 1987, Schuck made Hull take leave without pay for her absence and did not give her the opportunity to make up and receive pay for the missed day;
>
> Schuck recommended that the Board not renew Hull's teaching contract for the 1987-88 school year.

Hull alleged that defendants Plance, Schuck and Romes were carrying out the custom and policy of defendant Board and that these acts induced the Board not to renew her contract.

[1]Hull's motion to dismiss the Board members in their personal capacities was granted by the district court on May 5, 1990.

On March 20, 1990, the district court granted defendants' motion for summary judgment on each of plaintiff's claims. Plaintiff timely filed this appeal.

II.

Plaintiff argues that the district court erred in granting defendants' motion for summary judgment on the §1981 claims, because her termination was motivated by race and interfered with her right "to make and enforce contracts."

The district court held that the Supreme Court's recent decision in *Patterson v. McLean Credit Union*, 109 S. Ct. 2363 (1989) barred plaintiff's §1981 claims. Section 1981 protects the rights of all persons, regardless of race, "to make and enforce contracts." In *Patterson*, the Court limited the scope of §1981 to the formation of a contract and held that the statute did not apply to breach of the terms of the contract or imposition of discriminatory working conditions. *Id.* at 2376-77. Although *Patterson* did not specifically address the issue of whether §1981 applied to claims of discriminatory discharge, the majority of the circuit courts have held that claims of discriminatory discharge are no longer cognizable under §1981, because discharge does not involve contract formation. *Lavender v. V&B Transmissions & Auto Repair*, 897 F.2d 805, 808 (5th Cir. 1990) (because contract already was established, termination amounted to postformation conduct not actionable under §1981); *Courtney v. Canyon Television & Appliance Rental, Inc.*, 899 F.2d 845, 849 (9th Cir. 1990) (only refusal to hire on basis of race is actionable under §1981; discharge is the type of postformation "breach of contract" conduct not protected by §1981); *Carroll v. General Accident Insurance Co. of America*, 891 F.2d 1174, 1177 (5th Cir. 1990) (claim of "constructive discharge" involves terms and conditions of employment which are not cognizable under §1981); *Overby v. Chevron U.S.A., Inc.*, 884 F.2d 470, 473 (9th Cir. 1989) (retaliatory discharge claim is postformation conduct not cognizable under §1981). This

court has recently adopted the majority's position and also determined that *Patterson* should be applied retroactively. *Prather v. Dayton Power & Light Co.*, 918 F.2d 1255, 1258 (6th Cir. 1990).

Plaintiff attempts to avoid the impact of *Patterson* by arguing that her contract was "non-renewed" under Ohio Rev. Code §3319.11[2] rather than terminated and that the non-renewal impeded her from entering into a new contract with defendants. We find no merit in this argument. *Patterson* makes clear that in the context of promotions, a change in the employment relationship is critical before an act constitutes "contract formation conduct." The Court stated, "Only where the promotion rises to the level of an opportunity for a *new and distinct* relation between the employee and employer is such a claim actionable under §1981." 109 S. Ct. at 2377 (emphasis added). In the present case, the automatic renewal of plaintiff's contract would not have risen to the level of a new and distinct employment relationship; therefore, non-renewal under §3319.11, which is necessary to override the automatic renewal provision of a limited contract and to terminate employment, does not involve contract formation activity. For these reasons, we hold that non-renewal of a contract under Ohio Rev. Code §3319.11 does not impede plaintiff's right to "make or enforce" contracts and is not cognizable under §1981.

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[2]Ohio Rev. Code §3319.11(E) provides in relevant part:

> Any teacher employed under a limited contract . . . is, at the expiration of such limited contract, deemed re-employed under the provisions of this division at the same salary plus any increment provided by the salary schedule unless . . . the employing board, acting upon the superintendent's written recommendation that the teacher not be reemployed, gives such teacher written notice. . . . [Such teacher] is presumed to have accepted such employment unless he notifies the board in writing to the contrary . . . and a written contract for the succeeding school year shall be executed accordingly.

III.

Plaintiff next argues that the district court erred in granting defendants' motion for summary judgment on the 1985(3) claim.

To sustain a cause of action under 42 U.S.C. §1985(3), a plaintiff must prove the existence of a conspiracy among "two or more persons." Plaintiff alleges that district superintendent Schuck, executive director Plance, and vocational supervisor Romes conspired together to deprive her of her constitutional rights. Defendants argue that the "intra-corporate conspiracy" theory bars this claim. The theory states:

> It is basic in the law of conspiracy that you must have two persons or entities to have a conspiracy. A corporation cannot conspire with itself any more than a private individual can, and it is the general rule that the acts of the agent are the acts of the corporation.

Nelson Radio & Supply Co., Inc. v. Motorola, Inc., 200 F.2d 911, 914 (5th Cir. 1952), *cert. denied*, 345 U.S. 925 (1953).

We agree with defendants. This court has adopted the general rule in civil conspiracy cases that a corporation cannot conspire with its own agents or employees. *Doherty v. American Motors Corp.*, 728 F.2d 334, 339 (6th Cir. 1984). Although the doctrine was first developed in the context of antitrust litigation, this court in *Doherty* stated, "[T]he same rule has been consistently applied in allegations of conspiracy under the Civil Rights Act." *Id.* This court in *Doherty* agreed with a second circuit decision, *Herrmann v. Moore*, 576 F.2d 453 (2nd Cir. 1978), which applied the "intra-corporate conspiracy" doctrine to bar the plaintiff's §1985(2) claim. In *Herrmann*, the plaintiff had alleged a conspiracy between an educational corporation, the Brooklyn Law School, and its trustees and employees. In the present

case, plaintiff is alleging a conspiracy between a school district superintendent, the executive director of the district, and a school administrator, all of whom are employees or agents of the Board. Since all of the defendants are members of the same collective entity, there are not two separate "people" to form a conspiracy. We believe that this court's opinion in *Doherty* is dispositive of this issue. The district court's grant of defendants' motion for summary judgment on the §1985(3) claim is hereby affirmed on this ground.

IV.

In regard to plaintiff's §1983 claims, alleging that she had been deprived of the right to racially non-discriminatory employment, this court must first address the issue to what extent these claims are barred by the applicable statute of limitations. This action was filed on April 5, 1989. Hull learned of the impending non-renewal of her teaching contract on April 5, 1987. Defendants contend that all other alleged discriminatory acts, including teaching assignments, performance evaluations, working conditions and employment benefits occurred before April 1987 and are time-barred by the applicable state limitations period for §1983 claims, which in the present case is Ohio's two-year statute of limitations for actions involving bodily injury or injury to personal property. Ohio Rev. Code Ann. §2305.10 (Anderson 1981 & Supp. 1988).

Plaintiff asks this court to reconsider its unanimous en banc decision in *Browning v. Pendleton*, 869 F.2d 989, 990 (6th Cir. 1989), in which the court held that in Ohio §2305.10 governs actions under 42 U.S.C. §1983. Plaintiff contends that the four-year statute of limitations found in §2305.09 is more appropriate. In the alternative, plaintiff argues that despite the limitations period, all of plaintiff's claims are timely because they are part of a "continuing pattern" of discriminatory conduct.

We believe plaintiff's request to reconsider a unanimous en banc decision of this court should be declined.[3] As this court in *Browning* stated, the applicable state limitations period for §1983 claims is the two-year limitations period for actions involving bodily injury or injury to personal property found in Ohio Revised Code Ann. §2305.10.

However, we believe plaintiff's "continuing violation" theory has merit. This theory was first articulated by the Supreme Court in *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982). In *Havens*, plaintiffs brought suit under §804 of the Fair Housing Act, 42 U.S.C. §3604, alleging that the defendants engaged in "racial steering." Although four of the five incidents alleged in the complaint occurred outside the 180-day limitations period set forth in the statute, the Supreme Court, nevertheless, ruled that all of the incidents were actionable under a "continuing violation" theory. *Id.* at 380-81.

As the Court observed, "Plainly the claims . . . are based not solely on isolated incidents involving the two respondents, but a continuing violation manifested in a number of incidents -- including at least one . . . that is asserted to have occurred within the 180-day period." *Id.* at 381. Accordingly, the Court held that "where a plaintiff . . . challenges not just one incident of [unlawful] conduct . . . but an unlawful practice that continues into the limitations period, the complaint is timely when it is

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[3]In regard to plaintiff's argument that §2305.09(D) should apply because it governs actions for *intentional* infliction of emotional distress, the Supreme Court has expressly held that §1983 actions should *not* be analogized to intentional torts:

> Petitioners' argument that courts should borrow the intentional tort limitations periods because intentional torts are most analogous to §1983 claims fails to recognize the enormous practical difficulties of such a selection. Moreover, this analogy is too imprecise to justify such a result.

Owens v. Okure, 109 S. Ct. 573, 580 (1989). Instead the state's general or residual statute of limitations governing personal injury actions should be applied. *Id.*

filed within 180 days of the last asserted occurrence of that practice." *Id.* (footnote omitted).

In *Held v. Gulf Oil Co.*, 684 F.2d 427 (6th Cir. 1982), this court applied the "continuing violation" theory in a Title VII sex discrimination case, which culminated in a constructive discharge. The court in *Held* found that discriminatory acts made by the employer and various employees occurred throughout the term of plaintiff's employment and stated:

> [I]f the discriminatory acts commenced prior to the 180 day period and there was a continuous pattern of discrimination that continued into the 180 day period, plaintiff may still maintain her action [on all the claims] even though single discriminatory acts prior to the 180 days period are barred.

Id. at 430. If subsequent identifiable acts of discrimination occurred within the critical time period and were related to the time-barred incident, the bar does not apply. *Id.*

In the present case, as in *Held*, plaintiff alleges discriminatory working conditions throughout the term of her employment, which were related to her discharge. In *Conlin v. Blanchard*, 890 F.2d 811, 815 (6th Cir. 1989), this court stated that a court should determine what event "should have alerted the average lay person to protect his rights." In the present case, we believe that prior to the events surrounding plaintiff's discharge, plaintiff was not warranted in filing a race discrimination suit.

Defendants rely on *United Air Lines, Inc. v. Evans*, 431 U.S. 553 (1977) for the proposition that unless a plaintiff can demonstrate that a series of discriminatory acts are part of one ongoing plan or scheme, "[a] discriminatory act which is not made the basis for a timely charge" may constitute relevant background of a current practice, but separately considered, is merely "an unfortunate event in

history which has no present legal consequences." *Id.* at 558.

This court has specifically rejected a broad reading of this language in *Evans* (which concerned the impact of a seniority system on a pregnant woman who was fired and then rehired). "We regard *Evans* as a narrow case, which should be limited to instances of past discrimination perpetuated by bona-fide seniority systems." *Roberts v. North American Rockwell Corp.*, 650 F.2d 823, 827 (6th Cir. 1981). In *Rockwell*, this court found that *Evans* did not apply to a discriminatory hiring case. We believe that similarly it is inappropriate to apply *Evans* in the present case alleging racially discriminatory treatment in employment and discharge. As this court in *Rockwell* stated, there are important policy reasons not to require that a discrimination suit be filed at the first instance of discrimination or not at all. To do so, would frustrate the broad remedial purposes of civil rights laws which encourage the eradication of discrimination. *Id.*

For these reasons, we believe the district court erred in applying the two-year statute of limitations to all but plaintiff's discriminatory discharge claims.

V.

We will next address the merits of whether the district court erred in granting defendants' motion for summary judgment on the §1983 claims against defendants Schuck, Plance and Romes in their official and personal capacities.

A. Qualified Immunity

To establish the personal liability of defendants Schuck, Plance and Romes under 42 U.S.C. §1983, plaintiff must show that they deprived her of a federal right while acting under color of state law. *Wagner v. Metropolitan Nashville Airport Auth.*, 772 F.2d 227, 229 (6th Cir. 1985). Plaintiff alleged that defendants violated her 14th amendment rights to due process and equal protection by

intentionally discriminating against her on the basis of race.

Defendants Schuck, Plance and Romes moved for summary judgment on the ground of qualified immunity. Qualified immunity protects a public official from personal liability for civil damages insofar as his or her conduct does not violate "clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982).

When the issue of qualified immunity is raised, "the plaintiff is obliged to present facts which if true would constitute a violation of clearly established law." *Dominque v. Telb*, 831 F.2d 673, 677 (6th Cir. 1987) (citing *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985)). With respect to summary judgment motions on qualified immunity grounds, this court has held:

> Where, as here, discovery has taken place and the defendant officials have moved for summary judgment on the basis of qualified immunity, we believe the plaintiff must present direct evidence that the officials' actions were improperly motivated in order to have any hope of defeating the motion. The plaintiff, "to avert dismissal short of trial, must come forward with something more than inferential or circumstantial support for [her] allegation of unconstitutional motive."

Poe v. Haydon, 853 F.2d 418, 432 (6th Cir. 1988) (citations omitted), *cert. denied*, 488 U.S. 1007 (1989).

In the present case, the district court stated that *Poe* "established the quantum of proof necessary to overcome a motion for summary judgment based on qualified immunity in an unconstitutional motive case."

> Plaintiff argues that the holding in *Poe* is limited by this court's subsequent decision in *Crutcher v.*

> *Kentucky*, 883 F.2d 502, 504 (6th Cir. 1989), and that the district court improperly set too high a standard of proof to overcome a motion for summary judgment on the ground of qualified immunity by not allowing plaintiff to draw inferences from circumstantial evidence in proving her case. We agree. In *Crutcher*, this court stated:
>
> It is true that *Poe* states that "the plaintiff must present direct evidence that the officials' actions were improperly motivated in order to" resist a qualified immunity summary judgment motion. This does not mean that [the plaintiff] must bring in an admission from the lips of her defendant. She may rely on proof that would be strong enough to allow a jury to return a verdict for her under appropriate instructions, and it is clear that the law allows victims of race discrimination, as in other cases, to prove their cases by inferential and circumstantial proof. ***To the extent that [appellant] reads Poe to set a higher standard for qualified immunity than applies on the merits, he is wrong.***

Id. at 504 (citation omitted) (emphasis added).

Thus, the question presented on this appeal concerning the §1983 claims is whether plaintiff has presented sufficient probative evidence that would be strong enough to allow a jury to return a verdict for her.

B. Defendant Schuck

Defendant Schuck moved for summary judgment on the ground that his recommendation that plaintiff's contract not be renewed was not racially motivated. He stated in an affidavit that "the decision not to reappoint Ms. Hull was made solely because the program in which she worked, word processing specialist, was eliminated for the 1987-88 school year."

Plaintiff alleges that Schuck's racial animus may be inferred from the following. After receiving a poor evaluation for her ABT course by defendant Romes, plaintiff was reassigned by Schuck and Plance to word processing enrichment even though the teacher hired to teach ABT withdrew and courses were rearranged so that a white male could teach ABT. Plaintiff provides no evidence that Schuck and Plance, who did not make the ABT evaluation, used the poor evaluation as a pretext to keep plaintiff from teaching ABT.

Plaintiff also contends that a white teacher, who took a day off in the last five days of the school year, was afforded the opportunity to make up and receive pay for the lost time and plaintiff was not. Plaintiff has not demonstrated that she and the white teacher were similarly situated, particularly in view of the fact that plaintiff's employment terminated at the end of the school year. *See Shah v. General Electric Co.*, 816 F.2d 264, 270 (6th Cir. 1987) ("absent proof that the other employees were similarly situated, it is not possible to raise an inference of discrimination").

Plaintiff also argues that during her meeting with Schuck on April 5, 1987, Schuck did not tell her that the word processing program was being eliminated, but instead indicated that she "had not found a good match" with the district, that she "did not fit in," that her questions made him uncomfortable, and that he could not say more for legal reasons. Plaintiff also alleges that Schuck may not have been telling the truth in his affidavit, because the minutes of the Board of Education's April 15, 1987 meeting indicated that an "enrichment" position was open for the following year. Plaintiff's prior position with the school was to teach the word processing "enrichment" course.

Defendant Schuck contends that the "enrichment" position referred to in the minutes of the April 15, 1987 meeting was a computer graphics "enrichment" course.

However, there is no evidence to support this contention in the record.

If the inferences drawn from Schuck's failure to tell plaintiff the specific reason why her contract was not being renewed and the continuation of an "enrichment" position are construed in a light most favorable to plaintiff, they present evidence which is sufficient to cast doubt on Schuck's purported reason for non-renewal and create a genuine issue of material fact about the reason Schuck made the recommendation. Although we believe the remarks made by defendant Schuck to Hull during the April 5, 1987 meeting are racially neutral and alone are not sufficient probative evidence of discriminatory intent, we believe it would be proper to grant summary judgment to defendant Schuck only after it were conclusively determined that plaintiff's position was not continued. For this reason, the district court erred in granting defendant Schuck's motion for summary judgment on the §1983 claim before this issue was resolved.

C. Defendant Plance

Plaintiff argues that the deposition of William Jones, another teacher at Cuyahoga Valley, establishes that defendant Plance stated in the presence of William Jones in the school lounge somewhere between January and June of 1987 that plaintiff and another black faculty member were "a couple of dumb niggers" and the district was "going to get rid of them." Plaintiff contends that this racial slur made by Plance is evidence of his racial animus and unconstitutional motive in recommending that she not be rehired.

The district court characterized Jones' deposition testimony as insubstantial and insignificant, because Jones was hesitant about stating with certainty that a racial slur had been made or who had made it. In his deposition, Jones stated that at one time he believed the statement had been made, but three years had passed and he had come to have doubts about whether the statement was made and

could no longer recall exactly what was said or who said it.

However, Jones' deposition also reveals the following:

> Jones conceded that he had told Paul Brown, another teacher at the school and union official, that Plance had referred to plaintiff and another black woman in a racaially derogatory manner and that he "would like to get rid of them" or "they were going to get rid of them."
>
> Jones told Rich Bradley, an electronics teacher and another union official, the same thing about the remark Plance made.
>
> Jones told Mrs. Washington, a black administrator at the school, that Plance had referred to her and plaintiff in a racially derogatory manner.

Jones stated that he came away from the conversation with Plance with the belief that the racially derogatory word was used because "he was shocked that Dr. Plance would use that word."

After being told by Paul Brown that plaintiff was thinking about subpoenaing him, Jones stated that he would have to testify that he believed the statement was made, although he would prefer not to.

Recently, Jones had talked with the attorney for the defendants [Helen] for several hours in Dr. Plance's office. Jones testified:

> After talking with Helen, it was like--she pointed out to me--she made me think what was truth and what was speculation, and was I sure, and *I told her I was positive something was said*, but when I went home

> to think about it, I was not sure--you know, I was really confused, and I'm not sure it was even made now. I shouldn't say that. I'm not positive of what was said, or when it was made (emphasis added).

Jones did not know whether to trust the school lawyer or to trust plaintiff's lawyer and he didn't want to be saying things he shouldn't be saying.

Jones ended his testimony about the alleged racial slur with the following statement:

> *I have feelings I believe the statement was made*, but after talking to Helen, I had to sit down and say, "What is the truth? What do you believe?" And from the truth, you know, I want to say I don't know what the truth is at this point in time (emphasis added).

When construed in a light most favorable to plaintiff, it can reasonably be inferred from Jones' deposition testimony that he told three other people about the racial slur Dr. Plance made during their conversation and that it was only after talking to defendants' lawyer that he began to equivocate because he was fearful of saying the wrong thing. The district court applied an incorrect standard in dismissing Jones' deposition testimony as insignificant and insubstantial. Rather than drawing all inferences from the evidence provided by Jones in favor of plaintiff, the district court weighed the evidence and determined that Jones was not a credible witness. "[A]t the summary judgment stage the judge's function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986). It is clear that in reaching the conclusions that it did, the district court veered from this standard.

However, even if it were determined from Jones' testimony that Plance made a racially derogatory remark,

there is still a question of whether an isolated remark represents a sufficiency of direct evidence to raise a question of material fact regarding the motivation of defendant Plance in recommending that plaintiff's contract be non-renewed.[4] Although isolated remarks made by non-decisionmakers, *Chappell v. GTE Products Corp.*, 803 F.2d 261, 268 n.2 (6th Cir. 1986), *cert. denied*, 480 U.S. 919 (1987), or a blatantly discriminatory remark that may be perceived as a joke, *Gagne v. Northwestern National Insurance Co.*, 881 F.2d 309, 314 (6th Cir. 1989), are not sufficient evidence of discriminatory motive, Plance's remark was made by a decisionmaker and cannot be construed as a joke. His use of the word "niggers" cannot be characterized as harmless or casual. The court in *McKnight v. General Motors Corp.*, 908 F.2d 104, 114 (7th Cir. 1990) stated that the use of this word, even in jest, could be evidence of racial antipathy. *See also Bailey v. Binyon*, 583 F. Supp. 923, 930 (N.D. Ill. 1984) (malicious nature of this racially derogatory word reflects hostility and racial animus); *Cardona v. Skinner*, 729 F. Supp. 193, 199 (D. Puerto Rico 1990) (racial slur is probative on the issue of motive). In the present case, we believe that the use of the racially derogatory word in juxtaposition with Plance's statement that he wanted to get rid of two of the three black employees employed at the school, if true, is evidence of racial animus. For these reasons, we believe a question of material fact regarding the motivation of defendant Plance was raised and it was error for the district court to grant him summary judgment on the §1983 claim.[5]

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[4]Defendant Plance stated in his deposition that, generally speaking, he made teaching assignment decisions, but that Schuck always held veto power. Defendant Schuck stated that evaluations for renewal and non-renewal of teaching contracts were done at the supervisor level and then reviewed at the executive director level and then the executive director would review the decision with him.

[5]Plaintiff also alleges that Plance's two refusals to reassign plaintiff to regular classroom teaching were racially motivated. However, plaintiff has not demonstrated that similarly situated white teachers were treated differently. Plaintiff does not allege that white teachers are reassigned on demand.

C. Defendant Romes

Defendant Romes argues that plaintiff has produced no probative evidence that his evaluation of her ABT performance was racially motivated. We agree. Plaintiff has introduced no probative evidence that Romes' evaluation was discriminatory, but merely conclusively asserts that in her opinion the evaluation did not sufficiently take into account classroom conditions. *See Ackerman v. Diamond Shamrock Corp.*, 670 F.2d 66, 70 (6th Cir. 1982) (plaintiff's "personal conclusions" are insufficient to establish discrimination). Moreover, although Romes downgraded plaintiff for low student morale and group control, he stated that the classroom conditions "may be cause of loose group control."

Although Romes excused a white teacher from cafeteria duty to conduct school-related business and he did not excuse plaintiff from cafeteria duty so that she could continue an in-service seminar, plaintiff has not demonstrated that she and the white teacher were similarly situated.

Romes did not participate in the non-renewal decision and his evaluation of her in another course a year earlier is too tenuous a link in the decision not to rehire her. For these reasons, the district court's grant of summary judgment on the §1983 claim to defendant Romes is hereby affirmed.

VI.

Finally this court must determine whether the district court erred in granting defendants' motion for summary judgment on the §1983 claim against the Board.

A municipality may be held liable under §1983 only for official policies or customs. *City of St. Louis v. Praprotnik*, 485 U.S. 112, 128 (1988). Plaintiff argues that under *Pembaur v. Cincinnati*, 475 U.S. 469, 481 (1986), the Board may be held liable for the single

discriminatory act of an authorized decisionmaker, and that it was error for the district court to require a longstanding and ongoing discriminatory practice on the part of the Board.

Plaintiff misconstrues *Pembaur*. Under *Pembaur*, an "official policy" is one adopted by someone with "final authority *to establish municipal policy* with respect to the action ordered." *Id.* (emphasis added). Further:

> [O]nly those municipal officials who have "final policymaking authority" may by their actions subject the government to §1983 liability.

Praprotnik, 485 U.S. at 123. The question of final policymaking authority is one "of *state law*." *Id.* Section 3319.11 of the Ohio Revised Code states that a board of education has final authority to establish employment policy and make renewal and non-renewal decisions. *Justus v. Brown*, 42 Ohio St. 2d 53, 58 (1975).

Plaintiff's argument that Schuck exercises final authority, because the Board allegedly "rubber-stamps" his recommendations is contrary to *Paprotnik's* explicit warning not to look beyond where "applicable law purports" to vest power. 485 U.S. at 126. Moreover, the Court's illustration in *Pembaur* demonstrates how narrowly "final policymaker" is defined:

> [F]or example, the County Sheriff may have discretion to hire and fire employees without also being the county official responsible for establishing county employment policy. If this were the case, the Sheriff's decisions respecting employment would not give rise to municipal liability. . . . Instead, if county employment policy was set by the Board of County Commissioners, only that body's decision would provide a basis for county liability. This would be true even if the Board left the Sheriff discretion to hire and fire employees and the Sheriff exercised

> that discretion in an unconstitutional manner; the decision to act unlawfully would not be a decision of the Board.

475 U.S. at 483 n.12. We believe that Schuck's position is similar to that of the county sheriff, who was given as an example of one who is not a final decisionmaker in *Pembaur*. Thus, even if Schuck exercised his discretion to terminate plaintiff in an unconstitutional manner, this is not a decision of the Board. Under Ohio law, Schuck is not responsible for establishing final policy with respect to the renewal and non-renewal of employment contracts. There is no question that Plance and Romes are not "final policymakers." Thus, in the present case, the Board is not liable under §1983 unless plaintiff can prove the existence of discrimination by the members of the Board.

Plaintiff contends that the Board members knew Schuck's recommendation was racially motivated and knowingly ratified a discriminatory act, thereby converting discrimination into an official Board policy. There is no evidence to support plaintiff's claim that the Board members knew Schuck's recommendation was allegedly discriminatory. To the contrary, plaintiff acknowledges that she never initiated the subject of race in her conversations with the Board members whom she contacted. Of the two who raised the subject on their own, one expressly said he did *not* believe racism was involved, and one indicated he would look into the possibility of racial discrimination to satisfy himself that race was not involved. The fact that he voted in favor of non-renewal is not probative evidence that the Board knowingly ratified an unconstitutional act. Because plaintiff has failed to provide proof of an official Board policy or that the Board ratified Schuck's and Plance's allegedly racially discriminatory acts, the district court's grant of summary judgment to the Board on the §1983 claim is hereby affirmed.

VII.

The decision of the district court is affirmed in part and reversed in part. The grant of defendants' motion for summary judgment on the §1981 and §1985(3) claims is AFFIRMED. The grant of summary judgment on the §1983 claims to defendants Cuyahoga Valley Joint Vocational School District Board of Education and Gary Romes is AFFIRMED. The grant of summary judgment on the §1983 claims to defendants Schuck and Plance is REVERSED. The case is REMANDED to the district court for proceedings consistent with this opinion.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

STELLA HULL,	)	CASE NO. 89CV0621
Plaintiff,	)	Judge John M. Manos
v.	)	FILED MAR 20
	)	9:10 A.M. '90
CUYAHOGA VALLEY JOINT VOCATIONAL SCHOOL DISTRICT BOARD OF EDUCATION, et al.,	)	Clerk, U.S. District Court Northern District of Ohio
Defendants.	)	MEMORANDUM OF OPINION

On April 5, 1989, Stella Hull, plaintiff, filed the above-captioned case against the Cuyahoga Valley Joint Vocational School District Board of Education ("Board"), ten Board members,[1/] and three Board employees, Jerry Shuck, George Plance, and Gary Rcmes, defendants. In an amended complaint filed August 23, 1989, Hull alleges that defendants dis-

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1/ The Board members are Ruth Doering, Mary Ann Drobnick, Nancy Fike, Dave Grendel, Jim Krosky, Robert McAdoo, Norman Matthews, Doris Toth, Donna Wilk, and G. Meister.

criminated against her because of her race in violation of 42 U.S.C. §§ 1981, 1983, 1985(3), and Ohio law. Jurisdiction is proper under 28 U.S.C. §§ 1331 and 1343. The case is before the court on defendants' motion for summary judgment. For the following reasons, the motion is granted and this case is dismissed with prejudice.

I.

Hull is a black teacher formerly employed by the Board under a limited contract[2/] at the Cuyahoga Valley Joint Vocational School from 1982 until the end of [2]the 1986-87 school year. The school is part of the Cuyahoga Valley Joint Vocational School District ("District") which is managed by a ten

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2/ Under Ohio law, a limited contract is one for a term not to exceed five years. **Ohio Rev. Code Ann.** § 3319.08 (Anderson 1985).

member Board. As District Superintendent, Shuck makes recommendations to the Board on the renewal or nonrenewal of teaching contracts. He is assisted by Plance, the District's Executive Director in charge of personnel records. Romes, a vocational supervisor, evaluated Hull's teaching performance during the 1985-86 school year.

Hull started work in 1982 as a small group instructor in the Word Processing Enrichment Program. She trained students and staff in the use of word processing equipment. Concerned that the program would be short-lived, Hull sought other teaching assignments. In 1983 and 1984, she applied unsuccessfully to teach vocational courses involving secretarial work and data processing. In 1985, she was assigned to teach a new course called Advanced Business Technology (ABT). Romes supervised Hull's performance as

the ABT instructor, found it to be unsatisfactory, and recommended reassignment.

Plance reassigned Hull to the word processing program for the 1986-87 school year. On April 5, 1987, Shuck and Hull met at her request. In response to Hull's inquiry about her employment status for the following year, Shuck told her that he would recommend to the Board that it not renew her contract. On April 15, 1987, acting upon Shuck's recommendation, the Board voted unanimously not to renew Hull's teaching contract for the 1987-88 school year.

Hull alleges that during her employment, Shuck, Plance and Romes discriminated against her because of race as follows:

- prior to 1985, Hull was denied the opportunity to teach courses involving secretarial work and data processing;

[3] - Romes unfavorably evaluated Hull's teaching performance as the ABT course instructor;

- in 1985, Romes refused to excuse Hull from cafeteria duty;

- Plance removed Hull as the ABT course instructor at the end of the 1985-86 school year;

- in the spring of 1987, Plance referred to Hull in a racially derogatory manner; and

- Shuck recommended that the Board not renew Hull's teaching contract for the 1987-88 school year.

Hull alleges that these acts induced the Board to not renew her contract.

Counts one, two, and three of the amended complaint allege racial discrimination in violation of 42 U.S.C. § 1981. Counts four and five allege the same in violation of 42 U.S.C. § 1983. Count Six alleges a racially motivated conspiracy in violation of 42 U.S.C. § 1985(3). Count seven alleges a pendent state claim

of tortious interference with employment. Further, the individual defendants, Shuck, Plance, Romes, and the Board members are sued in both their personal and official capacities.[3/]

Defendants deny that they acted with any racial animus. They argue that Hull's contract was not renewed because the Board eliminated the word processing program in which she taught.

On motion for summary judgment, defendants bear the initial burden of "'showing'-that is, pointing out the District Court - that there is an absence of evidence to support the nonmoving party's case." Celotex Corp. v. Catrett, 477 U.S. 317, 325 (1986), cert. denied, ____ U.S. ____, 108 S. Ct. 1028 (1988). Hull may oppose the motion "by

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3/ Hull's motion to dismiss the Board members in their personal capacity is granted.

any of the kinds of evidentiary materials listed in Rule 56(C), except the mere pleadings themselves." Id. at 324. Any "'inferences to be drawn from the [4]underlying facts...must be viewed in the light most favorable to the party opposing the motion.'" Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986) (quoting United States v. Diebold, Inc., 369 U.S. 654, 655 (1962)).

II.

The initial question before the court is to what extent Hull's claims under §§ 1981, 1983, and 1985(3) are barred by the statute of limitations. This action was filed on April 5, 1989. Hull learned of the impending nonrenewal of her teaching contract on April 5, 1987. Defendants argue that all other alleged discriminatory acts, involving teaching assignments, performance eval-

uations, working conditions, and employment benefits, occurred before April 1987, and are thus time-barred. Since Congress has not established a limitations period for §§ 1981, 1983, or 1985(3), this court must look to the most analogous state statute. Burnett v. Grattan, 468 U.S. 42 (1984).

A.

Following Wilson v. Garcia, 471 U.S. 261 (1985), the Sixth Circuit has held that § 1981 claims should be characterized as tort actions subject to a state's statute of limitations for personal injury. Demery v. City of Youngstown, 818 F.2d 1257, 1261 (6th Cir. 1987). Here, the appropriate limitations period is Ohio's two-year statute of limitations for actions involving bodily injury or injury to personal property, **Ohio Rev. Code Ann.** § 2305.10 (Anderson 1981 & Supp. 1988). See Browning v. Pendleton,

869 F.2d 989, 990 (6th Cir. 1989) (en banc); Crawford v. Broadview Savings and Loan Co., 878 F.2d 1436 (6th Cir. 1989) (unpublished per curiam). Accordingly, only the nonrenewal of Hull's teaching contract is actionable under § 1981.

B.

Ohio's two-year personal injury statute of limitations also applied to § 1983 claims. Browning, 869 F.2d at 990. Again, only the nonrenewal of Hull's teaching [5]contract falls within the limitations period. However, Hull argues that despite the limitations period, all her claims are timely because they are part of a continuing violation. If defendants have engaged in a continuous policy or practice of discrimination, "the commencement of the statute of limitations period may be delayed until the last discriminatory act in furtherance of it...." Miller v. International

Tel. & Tel. Corp., 755 F.2d 20, 25 (2d Cir.), cert. denied, 474 U.S. 851, reh'g denied, 474 U.S. 1015 (1985).

Hull bears the burden of establishing the existence of a continuing violation. See LaBeach v. Nestle Co., 658 F. Supp. 676, 687 (S.D.N.Y. 1987). This requires proof of a "'series of related acts, one or more of which falls within the limitations period, or the maintenance of a discriminatory system both before and during the [limitations] period.'" Valentino v. United States Postal Serv., 674 F.2d 56, 65 (D.C. Cir. 1982) (quoting **B. Schlei & P. Grossman, Employment Discrimination Law** 232 (Supp. 1979)). Proof of the former requires "specific facts to show that the acts are related so as to constitute a plan" to discriminate against Hull because of her race; otherwise, "a continuing violation [would] exist[] every time an employer

commits multiple acts of discrimination against a single employee." Wingfield v. United Technologies Corp., 678 F. Supp. 973, 982 (D. Conn. 1988) (emphasis in original). Proof of the latter requires evidence that racial discrimination is standard operating procedure. Id. at 979.

Hull merely recites a chronology of alleged racially discriminatory incidents. Under either of the above standards, this is insufficient to raise a justiciable issue as to the existence of a continuing violation. Accordingly, only the nonrenewal of Hull's teaching contract is actionable under § 1983.

C.

Neither the Supreme Court nor the Sixth Circuit has definitively determined the most analogous state limitations period for § 1985(3) claims. Other courts have [6]applied the forum state's

personal injury statute of limitations applicable to § 1981 and § 1983 claims on the ground that § 1985(3) claims sound in tort. See Bougher v. University of Pittsburgh, 882 F.2d 74, 79 (3d Cir. 1989); Callwood v. Questel, 883 F.2d 272 (3d Cir. 1989). Accordingly, only the nonrenewal of Hull's teaching contract is actionable under § 1985(3).

III.

Defendants argue that the nonrenewal of Hull's teaching contract is not actionable under § 1981. Section 1981 protects the rights of all persons, regardless of race, "to make and enforce contracts." 42 U.S.C. § 1981. In Patterson v. McLean Credit Union, U.S. ____, ____, 109 S. Ct. 2363, 2372 (1989), the Supreme Court limited the scope of § 1981 to protection of only these rights. The Court stated that the right "to make" contracts "extends only

to the formation of a contract, but not to problems that may arise later from" postformation conduct. Id. Thus, an employer's discriminatory "refusal to enter into a contract with someone,...[or an] offer to make a contract only on discriminatory terms" violates § 1981; an employer's "breach of the terms of the contract or imposition of discriminatory working conditions...[are] matters more naturally governed by state contract law and Title VII." Id. at 2372-73. Additionally, the court explained that the right "to enforce" contracts "embraces protection of a legal process, and of a right of access to legal process, that will address and resolve contract-law claims without regard to race." Id. at 2373.

Since Patterson, most courts have held that employment termination does not involve the right to make or enforce a

contract. See Eklof v. Bramalea, Ltd., No. 89-5312, slip op. (E.D. Pa. Oct. 27, 1989) (LEXIS, Genfed library, Courts file); Greggs v. Hillman Distrib. Co., 719 F. Supp. 552 (S.D. Tex. 1989); Hall v. County of Cook, 719 F. Supp. 721 (N.D. Ill. 1989); Carter v. Aselton, 50 Fair Empl. Prac. Cas. (BNA) 251 (M.D. Fla. 1989); But see Booth v. Terminix Int'l., Inc., 722 F. Supp. 675 (D. Kan. [7]1989); Padilla v. United Air Lines, 716 F. Supp. 485 (D. Colo. 1989). The parties do not dispute that employment termination is beyond the scope of § 1981. Rather, they disagree as to whether the nonrenewal of Hull's contract is equivalent to a refusal to hire or employment termination.

Under Ohio law, nonrenewal is the equivalent of employment termination. Hull was hired by the Board pursuant to a one-year limited contract. Plaintiff's

Opposition to Defendants' Motion for Summary Judgment ("Opposition Brief" at 2. The re-employment of limited contract teachers is governed by **Ohio Rev. Code Ann.** § 3319.11(E) (Anderson 1985 & Supp. 1988) which provides in pertinent part:

> Any teacher employed under a limited contract...is, at the expiration of such limited contract, deemed re-employed... unless...the employing board, acting upon the superintendent's written recommendation that the teacher not be re-employed, gives such teacher written notice of its intention not to re-employ him on or before the thirtieth day of April.

Thus, nonrenewal is the means by which a school board terminates an otherwise continuing employment relationship. Since employment termination is postformation conduct, summary judgment is granted for defendants as to Hull's § 1981 claims.

IV.

Defendants seek summary judgment on Hull's § 1983 claims for the nonrenewal

of her teaching contract. To establish the personal liability of Shuck, Plance, and Romes, she must show that they deprived her of a federal right while acting under color of state law. Wagner v. Metropolitan Nashville Airport Auth., 772 F.2d 227, 229 (6th Cir. 1985). Hull alleges that defendants violated her fourteenth amendment rights to due process and equal protection. To establish the liability of the Board, she must show that its policy or custom was the "moving force" behind the violation of federal law. Monell v. Department of Social Services, 436 U.S. 658, 694 (1978).4/

4/ Since official capacity suits "generally represent only another way of pleading an action against an entity of which an officer is an agent," this standard also applied to Hull's claim against Shuck, Plance, Romes, and the Board members in their official capacity. Kentucky v. Graham, 473 U.S. 159, 165 (1985) (quoting Monell, 436 U.S. at 690, n.55).

[8]Shuck, Plance, and Romes move for summary judgment on the ground of qualified immunity. Qualified immunity entitles public officials to dismissal of insubstantial claims prior to trial. Mitchell v. Forsyth, 472 U.S. 511, 526 (1985). Whether a public official is so entitled is a question of law for the district court. Dominque v. Telb, 831 F.2d 673, 677 (6th Cir. 1987).

Qualified immunity generally is determined by examining the objective reasonableness of the defendant's conduct. A public officer defendant is qualifiedly immune unless his conduct violates a clearly established right of which a reasonable person would have known. Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982). This standard is a departure from prior law which allowed a plaintiff to rebut an immunity defense by introducing evidence to show that an

official acted with malicious intent. See Wood v. Strickland, 420 U.S. 308, 321 (1975). Nevertheless, a subjective approach to qualified immunity remains appropriate when plaintiff must prove unconstitutional motive to prevail. Poe v. Haydon, 853 F.2d 418, 430 (6th Cir. 1988), cert. denied, ___ U.S. ___, 109 S. Ct. 788 (1989).

A subjective inquiry is appropriate here. Shuck, Plance, and Romes argue that Hull was recommended for nonrenewal because the word processing program was eliminated. They argue that Hull has offered no evidence which overcomes this objective indicia of good faith.

In Poe, the Sixth Circuit established the quantum of proof necessary to overcome a motion for summary judgment based on qualified immunity in an unconstitutional motive case. Adopting the standard developed by the Court of

Appeals for the District of Columbia, the Poe court held that "plaintiff must present direct evidence that the officials' actions were improperly motivated in order to have [9]any hope of defeating the motion."5/ Poe, 853 F.2d at 432 (emphasis added) (citing Martin v. District of Columbia Metro. Police Dep't., 812 F.2d 1425, 1435 (D.C. Cir.), vacated in part and reh'g granted en banc, 817 F.2d 144 (D.C. Cir.), decision to rehear en banc rev'd and panel opinion reinstated sub nom. Bartlett ex rel. Neuman v. Bowen, 824 F.2d 1240 (D.C. Cir.

5/ The Sixth Circuit reaffirmed this standard in Crutcher v. Kentucky, 883 F.2d 502, 504 (6th Cir. 1989). The test does not require Hull "to come forth with more evidence than she would have to produce to prevail on the merits" or mean that she "must bring in an admission from the lips of" the defendant. Id. Instead, she must produce some specific factual evidence which is sufficiently probative of unconstitutional motive. Martin, 812 F.2d at 1436.

1987)). The Martin court offered the following explanation of this standard:

> [W]e must take care not to reimpose "precisely the burden Harlow sought to prevent. Before Harlow, "an official's subjective good faith ha[d] been considered to be a question of fact inherently requiring resolution by a jury." That approach produced results "incompatible with [the Supreme Court's] admonition... that insubstantial claims should not proceed to trial." The Supreme Court's "strong condemnation of insubstantial suits against government officials," impels the application of a standard more demanding of plaintiffs when public officer defendants move for summary judgment on the basis of their qualified immunity.
>
> We set out, as best we can capture it, that more demanding standard. Where the defendant's subjective intent is an essential component of plaintiff's claim, once defendant has moved for pretrial judgment based on a showing of the objective reasonableness of his actions, then plaintiff, to avert dismissal short of trial, must come forward with something more than inferential or circumstantial support for his allegation of unconstitutional motive. That is, some direct evidence that the officials' actions were improperly motivated

> must be produced if the case is to proceed to trial.

Martin, 812 F.2d at 1435 (citations omitted). In determining qualified immunity, each defendant must be judged on the basis of his own conduct and motive. Poe, 853 F.2d at 427, n.5.

[10]1.

Shuck moves for summary judgment on the ground that his recommendation of nonrenewal was not racially motivated. Hull argues that two incidents are sufficiently probative of unconstitutional motive to warrant denial of the motion.

The first instance concerns the April 5, 1987 meeting with Shuck in which Hull learned of his intention to recommend nonrenewal of her contract. She alleges that racial animus may be inferred because Shuck did not tell her that the word processing program was being eliminated, and because he said that she

"had not found a good match" with the District, that she "did not fit in," that her questions made him uncomfortable, and the he could not say more for legal reasons. Hull Aff. ¶ 13 (Exh. A to Opposition Brief). The second incident occurred near the end of the 1986-87 school year. Hull alleges that, unlike a white teacher, Shuck did not permit her to work an extra day to make up for time taken off without pay. Id. at ¶ 12.

These two fact recitations are not probative of unconstitutional motive. Hull merely relies on her own perceptions of a meeting with Shuck and a conclusory allegation of disparate treatment regarding personal leave. Additionally, she has produced no evidence that the word processing program continued after termination of her employment. Accordingly, summary judgment is granted for Shuck as to Hull's § 1983 claim.

Hull alleges that Plance is liable under § 1983 because Shuck consulted him on the nonrenewal recommendation. As evidence of racial animus, she alleges that Plance made a racially discriminatory remark about her in the spring of 1987. Opposition Brief at 27.

The sole evidence of this is the deposition of William Jones, a school administrator. Jones testified that he heard Plance remark that Hull and another black employee were a couple of "dumb niggers" and that "they were going to get rid [11]of them." Jones Dep. at 15. However, upon further questioning by Hull's attorney, George Palda, Jones was uncertain as to whether such a statement was made:

> [Jones]
> A. I believe Dr. Plance had made a statement when I was in the lounge. I do not remember what the words were; it's

been three years. If it was said--if it was said--I can't remember whether it was said or wasn't said.

[Palda]

Q. Well, if--you believe a statement was made?

A. I know I said something to Mrs. Washington, but it's been three years--

Q. Okay.

A. --so I believe a statement was made. You know, I'm not sure. I believe the statement was made because of some things I remember, but I can't remember what was said, when it was said, and that gives me a doubt as to whether it was ever said or speculation from what other people told me.

Jones Dep. at 37.

This evidence reveals the insubstantiality of the allegations against Plance.[6/] Since Hull has not produced

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6/ Even if Plance made the statement, "a solitary remark...[is] insufficient to create an issue of material fact which would preclude entry of summary judgment in favor of the defendant." Gagne v. Northwestern Nat'l Ins. Co., 881 F.2d 309, 314 (6th Cir. 1989).

significant probative evidence of unconstitutional motive, summary judgment is granted for Plance as to Hull's § 1983 claim.

3.

Hull alleges that Romes is liable for the nonrenewal of her contract because he unfavorably evaluated her performance as the ABT instructor and recommended that she be reassigned. She alleges "that there is no reasonable explanation for this behavior other than...race discrimination." Hull Aff. at ¶ 8. Hull also alleges that at least once during the 1985-86 school year, Romes excused a white teacher from cafeteria duty but not her. Again, Hull alleges that "[t]here is no reasonable explanation for this difference in treatment other than...race discrimination." Id. at ¶ 9.

[12]Hull's speculation as to Romes' motivation is insufficient evidence of unconstitutional motive. Accordingly, summary judgment is granted for Romes as to Hull's § 1983 claim.

B.

Hull claims that her employer, the Board, is liable under § 1983 because Shuck, Plance, and Romes acted pursuant to the custom and policy of the District. A public entity, such as a school board, can be liable only if plaintiff proves the existence of an unconstitutional custom or policy. City of St. Louis v. Praprotnik, 485 U.S. 112, 121-122 (1988). Hull has produced no evidence of an official Board policy of racial discrimination, a discriminatory practice within the District, or discriminatory behavior on the part of its supervisory officials, Shuck, Plance and Romes. Accordingly, summary judgment is

granted for the Board as to Hull's § 1983 claim.[7]

V.

Hull alleges that Shuck, Plance, and Romes conspired to deprive her of her constitutional rights in violation of § 1985(3). To recover under § 1985(3) for the nonrenewal of her contract, Hull must prove that these defendants entered into an agreement to deprive her of the equal protection of the law or of equal privileges and immunities under the law, that they committed an act in furtherance of the conspiracy, and thereby injured her. Griffin v. Breckenridge, 403 U.S. 88, 102-103 (1971).

Hull has not presented a scintilla of evidence that defendants by agreement

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[7] This holding also applies to Hull's claims against the Board members, Shuck, Plance, and Romes in their official capacity. See supra note 4.

induced the Board to nonrenew her contract or engaged in any discriminatory behavior. Hull was first assigned to the word processing program from which she sought reassignment. She was then assigned to the ABT program in which she performed unacceptably. After her reassignment to the word processing program, [13]the Board eliminated the program and then nonrenewed her contract. Accordingly, summary judgment is granted for Shuck, Plance, and Romes as to Hull's conspiracy claim under § 1985(3).[8]

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[8] In light of this ruling, the court need not address defendants' argument that Hull failed to state a § 1985(3) claim because of the intracorporate conspiracy rule. The intracorporate conspiracy rule precludes § 1985(3) claims against employees of a single corporation and it has been applied by district courts in this circuit. See Schroeder v. Dayton-Hudson Corp., 448 F. Supp. 910, 915 (E.D. Mich. 1977), amended, 456 F. Supp. 650 (E.D. Mich. 1978); Fallis v. Dunbar, 386 F. Supp. 1117, 1121 (N.D. Ohio 1974), aff'd, 532 F.2d 1061 (6th Cir. 1976); but see An-Ti Chai v. Michigan Technological Univ., 493 F. Supp. 1137, 1164-67 (W.D. Mich. 1980).
(Footnote continued)

VI.

Finally, Hull alleges that Shuck, Plance, and Romes induced the Board to terminate its employment relationship with Hull in violation of Ohio common law. Ohio recognizes a cause of action against "outsiders" for tortious interference with employment. Anderson v. Minter, 32 Ohio St. 2d 207, 213, 291 N.E.2d 457, 461 (Ohio 1972). However, supervisory employees who act within the scope of their employment against a fellow employee are not "outsiders" to the employment relationship. Id. Since the actions taken by Shuck, Plance, and Romes were within the scope of their duties, summary judgment is granted for defendants as to Hull's claim of tortious interference with employment.

VII.

In sum, Hull has not produced sufficient evidence to create a genuine issue of material fact as to any of the seven counts of her amended complaint. Accordingly, summary judgment is granted for defendants and this case is dismissed with prejudice.

IT IS SO ORDERED.

/s/ JOHN M. MANOS
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

STELLA HULL,	)	CASE NO. 89CV0621
	)	
Plaintiff,	)	Judge John M. Manos
	)	
v.	)	FILED MAR 20
	)	9:10 A.M. '90
CUYAHOGA VALLEY	)	Clerk, U.S. District
JOINT VOCATIONAL	)	Court
SCHOOL DISTRICT	)	Northern District of
BOARD OF	)	Ohio
EDUCATION, et al.,	)	
	)	ORDER
Defendants.	)	

Pursuant to the Memorandum of Opinion issued in the above-captioned case this date, defendants' motion for summary judgment is granted and this case is dismissed with prejudice.

IT IS SO ORDERED.

/s/ JOHN M. MANOS
UNITED STATES DISTRICT JUDGE

No. 90-3360
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

O R D E R

FILED MARCH 20, 1991
LEONARD GREEN, Clerk

STELLA HULL

Plaintiff-Appellant

v.

CUYAHOGA VALLEY JOINT VOCATIONAL SCHOOL DISTRICT BOARD OF EDUCATION

Defendant-Appellee

BEFORE: KEITH and MILBURN, Circuit Judges; and CONTIE, Senior Circuit Judge.

Upon consideration of the petition for rehearing filed by the appellant,

It is ORDERED that the petition for rehearing be, and it hereby is, DENIED.

ENTERED BY ORDER OF THE COURT

/s/ LEONARD GREEN
Leonard Green, Clerk

UNITED STATES CONSTITUTION
AMENDMENT XIII

Section 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

Section 2. Congress shall have power to enforce this article by appropriate legislation.

UNITED STATES CONSTITUTION
AMENDMENT XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

* * *

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

UNITED STATES CODE
CHAPTER 42

§ 1981. Equal rights under the law

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

UNITED STATES CODE

CHAPTER 42

§ 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia

shall be considered to be a statute of the District of Columbia.

UNITED STATES CODE
CHAPTER 42

§ 1985. Conspiracy to interfere with civil rights

* * *

(3) If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or

advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice President, or as a Member of Congress of the United States; or to injure any citizen in person or property on account of such support or advocacy; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages occasioned by such injury or deprivation, against any one or more of the conspirators.

§ 3319.08 Teacher employment and re-employment contracts.

The board of education of each city, exempted village, local, and joint vocational school district shall enter into written contracts for the employment and re-employment of all teachers. The board of education of each city, exempted village, local, and joint vocational school district that authorizes compensation in addition to the base salary stated in the teachers' salary schedule for the performance of duties by a teacher which are in addition to the teacher's regular teaching duties, shall enter into a supplemental written contract with each teacher who is to perform additional duties. Such supplemental written contracts shall be limited contracts. Such written contracts and supplemental written contracts shall set forth the teacher's duties and

shall specify the salaries and compensation to be paid for regular teaching duties and additional teaching duties, respectively, either or both of which may be increased but not diminished during the term for which the contract is made, except as provided in section 3319.12 of the Revised Code.

If a board of education adopts a motion or resolution to employ a teacher under a limited or continuing contract and the teacher accepts such employment, the failure of such parties to execute a written contract shall not void such employment contract.

Teachers must be paid for all time lost when the schools in which they are employed are closed owing to an epidemic or other public calamity, and for time lost due to illness or otherwise for not less than five days annually as authorized by regulations which each board of

education shall adopt.

Contracts for the employment of teachers shall be of two types, limited contracts and continuing contracts. A limited contract is:

(A) For a superintendent, a contract for such term as authorized by section 3319.01 of the Revised Code;

(B) For an assistant superintendent, principal, assistant principal, or other administrator, a contract for such term as authorized by section 3319.02 of the Revised Code;

(C) For all other teachers, a contract for a term not to exceed five years.

A continuing contract is a contract that remains in effect until the teacher resigns, elects to retire, or is retired pursuant to section 3307.37 of the Revised Code, or until it is terminated or suspended and shall be granted only to

teachers holding professional, permanent or life certificates. This section applies only to contracts entered into after August 18, 1969.

§ 3319.11 Continuing service status and contract; limited contract; failure of board or superintendent to act.

Teachers eligible for continuing service status in any school district shall be those teachers qualified as to certification, who within the last five years have taught for at least three years in the district, and those teachers who, having attained continuing contract status elsewhere, have served two years in the district, but the board of education, upon the recommendation of the superintendent of schools, may at the time of employment or at any time within such two-year period, declare any of the latter teachers eligible.

Upon the recommendation of the superintendent that a teacher eligible for continuing service status be re-employed, a continuing contract shall be

entered into between the board and such teacher unless the board by a three-fourths vote of its full membership rejects the recommendation of the superintendent. The superintendent may recommend re-employment of such teacher, if continuing service status has not previously been attained elsewhere, under a limited contract for not to exceed two years, provided that written notice of the intention to make such recommendation has been given to the teacher with reasons directed at the professional improvement of the teacher on or before the thirtieth day of April, and provided that written notice from the board of education of its action on the superintendent's recommendation has been given to the teacher on or before the thirtieth day of April, but upon subsequent re-employment only a continuing contract may be entered into. If the board of educa-

tion does not give such teacher written notice of its action on the superintendent's recommendation of a limited contract for not to exceed two years before the thirtieth day of April, such teacher is deemed re-employed under a continuing contract at the same salary plus any increment provided by the salary schedule. Such teacher is presumed to have accepted employment under such continuing contract unless he notifies the board in writing to the contrary on or before the first day of June, and a continuing contract shall be executed accordingly.

A teacher eligible for continuing contract status employed under an additional limited contract for not to exceed two years pursuant to written notice from the superintendent of his intention to make such recommendation, is, at the expiration of such limited contract, deemed re-employed under a continuing

contract at the same salary plus any increment granted by the salary schedule, unless the employing board, acting on the superintendent's recommendation as to whether or not the teacher should be re-employed, gives such teacher written notice of its intention not to re-employ him on or before the thirtieth day of April. Such teacher is presumed to have accepted employment under such continuing contract unless he notifies the board in writing to the contrary on or before the first day of June, and a continuing contract shall be executed accordingly.

A limited contract may be entered into by each board with each teacher who has not been in in the employ of the board for at least three years and shall be entered into, regardless of length of previous employment, with each teacher employed by the board who holds a provisional or temporary certificate.

Any teacher employed under a limited contract, and not eligible to be considered for a continuing contract, is, at the expiration of such limited contract, deemed re-employed under the provisions of this section at the same salary plus any increment provided by the salary schedule unless the employing board, acting on the superintendent's recommendation as to whether or not the teacher should be re-employed, gives such teacher written notice of its intention not to re-employ him on or before the thirtieth day of April. Such teacher is presumed to have accepted such employment unless he notifies the board in writing to the contrary on or before the first day of June, and a written contract for the succeeding school year shall be executed accordingly. The failure of the parties to execute a written contract shall not void the automatic re-employment of such

teacher.

The failure of a superintendent of schools to make a recommendation to the board of education under any of the conditions set forth in this section, or the failure of the board of education to give such teacher a written notice pursuant to this section shall not prejudice or prevent a teacher from being deemed re-employed under either a limited or continuing contract as the case may be under the provisions of this section.

90-1671

No. 90-1761

In The

Supreme Court of the United States

October Term, 1990

STELLA HULL,

Petitioner,

vs.

JERRY SHUCK AND GEORGE PLANCE,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

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BRIEF OPPOSING PETITION FOR A WRIT OF CERTIORARI

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COUNTERSTATEMENT OF THE CASE

There are two significant errors and/or omissions in petitioner's statement of the case. The first relates to the District Court's disposition of the §1985(3) conspiracy claim. Petitioner points out that the Court of Appeals affirmed dismissal of this claim on purely legal grounds, relying on the intracorporate conspiracy doctrine. But she fails to mention the reason the District Court dismissed it. The district court found, "Hull has not presented a scintilla of evidence that the defendants by agreement induced the Board to non-renew her contract." (Memorandum Opinion at 12; App. at A-49 - A-50). Accordingly, the District Court dismissed the §1985(3) claim on factual grounds, for failure to meet her Rule 56 responsibility to offer some proof of a racially motivated conspiracy. The Court of Appeals never disturbed that finding; it simply elected to affirm on an alternative, independently sufficient legal ground.

Second, petitioner mischaracterizes the disposition of the claim against defendant Shuck. The Court of Appeals rejected most of petitioner's evidence as legally insufficient to raise any inference of discrimination. It remanded the §1983 claim against Shuck only for clarification of a single factual point, indicating that once respondents establish this fact, summary judgment for defendant Shuck will be appropriate (emphasis added):

> Although we believe the remarks made by defendant Schuck [sic] to Hull during the April 5, 1987 meeting are *racially neutral* and alone are not sufficient probative evidence of discriminatory intent, we believe *it would be proper to grant summary judgment* to defendant Shuck only *after* it were conclusively determined that plaintiff's position was not continued.

(Court of Appeals Opinion, App. at p. A-15). [1]

SUMMARY OF ARGUMENT

The §1985(3) question petitioner raises — regarding the intracorporate conspiracy doctrine — need not be reached. Even assuming a conspiracy claim theoretically could lie against co-employees who jointly discuss personnel decisions, the *facts* of this case contain not one "scintilla" of evidence suggesting a racially-motivated conspiracy, as the district court expressly held. Thus, the issue petitioner attempts to raise need not be reached, and certainly does not affect the outcome of this case. In any event, the Court of Appeals correctly interpreted §1985(3) when it adopted and applied the intracorporate conspiracy doctrine to bar petitioner's claim as a matter of law.

As to the §1983 argument, the question petitioner raises is primarily one of state law. The issue is whether failure to renew a non-tenured teaching contract, pursuant to Ohio Revised Code §3319.11, constitutes a termination of employment (i.e., a discharge) or a failure to hire. That question of Ohio law should be of no interest

[1] The debate over discontinuation of plaintiff's position is ridiculous. Plaintiff taught word processing enrichment, a position eliminated due to declining enrollment. A different "enrichment" position remained open the following year, but it involved computer aided design; it was not the word processing enrichment position plaintiff had held.

"Enrichment" is a generic term, just like "classroom teacher" is a generic phrase. There are enrichment positions in several subject areas, just as there are classroom teaching positions in many different fields. Nonetheless, the Court of Appeals remanded, requiring defendants to submit an affidavit to this effect. Once defendants do so, summary judgment for Shuck is appropriate under the Court of Appeals' holding.

to this Court, and even if it were, the Courts below decided it correctly.

ARGUMENT

I. PETITIONER'S §1985(3) ARGUMENT RAISES NO ISSUE OF PUBLIC INTEREST.

A. It Is Unnecessary To Even Consider The Legal Theory Petitioner Advances, Because The Facts Fail To State A Claim Even Under Her Theory.

Petitioner argues that a conspiracy claim under 42 U.S.C. §1985(3) should not automatically be precluded. She challenges the intracorporate conspiracy doctrine, which holds, as a matter of law, that no "conspiracy" can exist among employees of a single corporation, at least not when all they do is make a joint recommendation while acting within the scope of their employment. Petitioner is wrong on the legal issue, but there is no need to reach it. Even assuming a conspiracy claim is not automatically precluded, she cannot survive summary judgment here, based on the undisputed *facts* of this case.

The District Court found, "Hull has not presented a scintilla of evidence that the defendants by agreement induced the Board to non-renew her contract." (Memorandum Opinion at 12; App. at A-49 - A-50). The opinion further states, "In light of this ruling, the court need not address defendants' argument that Hull failed to state a §1985(3) claim because of the intracorporate conspiracy rule." (Memorandum Opinion at 12; App. at A-50 n. 8).

The District Court's conclusion — there was absolutely no evidence of a racially motivated conspiracy — clearly was correct. To prove a §1985(3) claim, plaintiff must prove several elements, including the existence of

a tacit or express *agreement* between defendants (*i.e.*, a meeting of the minds) to commit an *unlawful* act. *United Brotherhood of Carpenters, Local 610 v. Scott*, 463 U.S. 825, 828-29 (1983); *Griffin v. Breckenridge*, 403 U.S. 88, 102-03 (1971); *Trautvetter v. Quick*, 916 F.2d 1140, 1153 (7th Cir. 1990) ("allegations of conspiracy must be supported by facts suggesting a meeting of the minds between two or more persons"). Yet plaintiff herself admitted:

> Q. Do you remember telling me anything that supports a contention that you were plotted against because of your race?
>
> A. I said there was a conspiracy or something?
>
> Q. Yes.
>
> A. No, I don't recall telling you anything that there was a conspiracy.
>
> * * *
>
> Q. Do you have any facts to support your belief that Mr. Romes and/or Doctor Plance and/or Doctor Schuck [sic] and/or any other individual at the school district got together and decided that you would be non-renewed because of your race?
>
> A. I don't have any facts. I don't know what, you know, they talk about when they get together or whatever, you know.

(R. 23: Deposition of Stella Hull, pp. 315-16, Exhibit F to Defendants' Brief submitted in the Court of Appeals).

The evidence shows only that Shuck and Plance discussed non-renewals, as part of their routine job duties. Even assuming, *arguendo*, each defendant was *secretly* motivated by racial animus during this decision-

making, that establishes only *independent* discriminatory conduct, not the required meeting of the minds. (Supra, p. *). So far as each defendant was aware, the other defendant was acting solely to promote the school district's interests, and that does not constitute a *racially motivated* conspiracy. *See Griffin v. Breckenridge*, 403 U.S. at 102-03 ("there must be some racial . . . onimus behind the conspiracy action").

These arguments were briefed and raised in the Court of Appeals, but the Court elected to affirm based on the intracorporate conspiracy doctrine. (Court of Appeals Opinion, App. at A-7 - A-8). The appellate court acted properly, because that doctrine provides an independently sufficient ground for dismissing the §1985(3) claim. But the Court of Appeals never disturbed the District Court's factual analysis and corresponding holding, which likewise constitutes an independently sufficient basis for the summary judgment. Thus, there is no need to even consider the intracorporate conspiracy doctrine. This claim can be, should be, and originally was dismissed on purely factual grounds.

B. The Court Of Appeals Decided The Intracorporate Conspiracy Issue Correctly.

Plaintiff apparently concedes that if the intracorporate conspiracy doctrine is valid, her §1985(3) claim is precluded. However, she asserts there is a circuit split, and urges this Court to repudiate the doctrine, at least as applied to §1985(3) claims.

While there is some disagreement among the circuits, it is not as widespread as plaintiff suggests. She claims the First, Third, Fifth and Eleventh Circuits have held this doctrine inapplicable to §1985(3) actions, but that is not true. The Fifth Circuit case she cites is

Dussouy v. Gulf Coast Investment Corp., 660 F.2d 594 (5th Cir. 1984). *Dussouy* was not a §1985(3) case; in fact, it was not even decided under *federal* law. It was a state law antitrust case in which the Court held, "[A]lthough Louisiana law differs from the federal [intracorporate conspiracy] rule, *Erie v. Tompkins* . . . mandates application of the Louisiana rule." *Dussouy*, 660 F.2d at 604.

Likewise, plaintiff's Eleventh Circuit case, *United States v. Hartley*, 678 F.2d 961 (11th Cir. 1982), did not involve §1985(3), but rather was a criminal case under 18 U.S.C. §371. No case decided by either the Fifth or Eleventh Circuit has held the intracorporate conspiracy doctrine inapplicable to §1985(3) actions. The weight of appellate authority supports defendants' position, with only the First and Third Circuits taking contrary views.

Further, logic supports the conclusion reached by the majority of appellate courts, including the one below. Internal discussions among employees of one corporation, relating solely to personnel actions within the corporation, are not the kind of behavior §1985(3) was intended to address:

> Section 1985 descends from the Civil Rights Act of 1871, commonly known as the Ku Klux Klan Act . . . Congress was concerned not about unilateral action but about organized resistance to emancipation and civil rights. Fear of violence (a theme running throughout the text of and debates on the 1871 act) could *unite disparate centers of influence* . . . . The Klan *meddled in the business of others*; that is what made it dangerous. The [defendant employer, by contrast,] minded its own business.

Travis v. Gary Community Mental Health Center, 921 F.2d 108, 110 (7th Cir. 1990). Plainly, employees of one

corporation making joint recommendations in the ordinary course of business is not the kind of "meddl[ing] in the business of others" with which §1985(3) is concerned.

Moreover, the intracorporate conspiracy doctrine recognizes the reality of how personnel decisions are made. There are legitimate reasons for persons within a corporation to discuss and act jointly on personnel matters. Nor is it unusual, when supervisory employees agree on a personnel decision, for each to have different reasons for supporting the decision (one common reason being a desire for consensus). Thus, the mere fact two employees meet and then both support a personnel decision does not remotely suggest any illicit conspiracy occurred,[2] even if it later turns out one employee was motivated by racial animus. It would be grossly unfair to permit an inference of racially-based conspiracy, based solely on the fact defendants followed normal business practices and discussed their personnel recommendations, when there is not one "scintilla" of evidence that the subject of race even came up in defendants' meetings.[3]

Finally, petitioner's position creates a substantial litigation burden for no good reason, as illustrated by the present case: Petitioner's claims under 42 U.S.C. §1983 have been remanded. What gain is there in *also*

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[2]This is what distinguishes intracorporate personnel discussions from other alleged "conspiracies." In an ordinary conspiracy case, the mere fact two parties get together and agree to do something (such as fix prices or rob a bank) proves unlawful conduct. But in the intracorporate personnel context, there is nothing inherently unlawful about co-employees getting together and making a joint recommendation to discharge someone.

[3]Again, petitioner *concedes* she has absolutely no evidence of what they discussed among themselves. (*Supra*, p. *).

proceeding with a §1985(3) action, for conspiracy to violate §1983? That simply multiplies the number of claims, prolonging and complicating the litigation, without adding to the available remedies *or* the circumstances in which petitioner can recover.

Such redundant litigation would be commonplace were it not for the intracorporate conspiracy doctrine. In today's world, two or more persons participate in *most* personnel decisions. But for the intracorporate conspiracy doctrine, plaintiffs likely would allege §1985(3) conspiracy claims in virtually all employment discrimination cases against public defendants. There is no reason to encourage such a multiplication of claims, particularly against public officials. *See Harlow v. Fitzgerald*, 457 U.S. 800, 816 (1982) (recognizing societal "costs of subjecting officials to the risks of trial"). Avoiding charges of conspiracy every time two or more public officials participate in a personnel decision is a good reason to retain the intracorporate conspiracy doctrine.

In sum, the legal question petitioner raises need not be reached to resolve this case. Further, the Court of Appeals correctly followed the majority rule in adopting the intracorporate conspiracy doctrine. This Court should not grant certiorari to review a question that need not be decided and which was decided correctly below.

II. PETITIONER'S §1981 ARGUMENT RAISES NO QUESTION OF PUBLIC INTEREST.

A. The Relevant Federal Questions Are Settled; The Only Issue In Dispute Is A Question Of State Law.

It is settled law that discharges are not actionable under §1981. This Court established the basic rules for

§1981 actions in *Patterson v. McClean Credit Union*, 109 S.Ct. 2363 (1989). Since that decision, courts of appeals overwhelmingly have held that actions for discharge are not cognizable under §1981.[4] Plaintiff disputed this proposition below, but now apparently concedes the futility of further argument on this point.

Thus, the only remaining issue is whether non-renewal of a teacher's contract, under Ohio Revised Code §3319.11, is a discharge/termination as opposed to a failure to hire. The courts below correctly held it is a termination, but that question of Ohio law should not be of interest to this Court.

B. The Court Of Appeals Decided The §1981 Issue Correctly, Because A Non-Renewal Under O.R.C. §3319.11 Is A Termination Of Employment.

Plaintiff was employed until the Board non-renewed her limited contract, pursuant to Ohio R.C. §3319.11. The District Court correctly held, "Under Ohio law, nonrenewal is the equivalent of employment termination." (Memorandum Opinion at 7; App. at p. A-36). Plaintiff's contrary characterization, that the Board failed to enter into a new, albeit identical contract, is plainly wide of the mark.

This Court previously considered and rejected a variant of petitioner's theory, posed hypothetically by Justice Stevens' dissent in *Patterson*. Any discharged employee at-will can make exactly the same argument petitioner does — he/she was not discharged; rather,

[4] *E.g., Gonzalez v. Home Insurance Co.*, 909 F.2d 716 (2d Cir. 1990); *Walker v. South Central Bell Telephone Co.*, 904 F.2d 275 (5th Cir. 1990); *McKnight v. General Motors Corp.*, 908 F.2d 104 (7th Cir. 1990); *Courtney v. Kenyon Television & Appliance Rental, Inc.*, 899 F.2d 845 (9th Cir. 1990); *Sherman v. Burke Contracting, Inc.*, 891 F.2d 1527 (11th Cir. 1990).

the "old" employment contract expired and the employer refused to enter into a "new" one. In Justice Stevens' words, "An at-will employee, such as petitioner, is not merely performing an existing contract; she is constantly remaking that contract." 109 S.Ct. at 2396 (dissenting).

The majority in *Patterson* credited Justice Stevens with "ingenuity," then rejected his view and warned lower courts to avoid such mental gymnastics and follow a "straightforward" approach. 109 S.Ct. at 2377 n.6. Lower courts have followed that admonition, overwhelmingly rejecting petitioner's theory when advanced by employees at-will:

> We are mindful of the argument that employment at will... should be analyzed not as a single contract but as a series of fresh contracts made every day of continued employment; on this view, termination on racial grounds prevents the employee from making the next day's contract of employment.

McKnight, 908 F. 2d 104 (rejecting the quoted theory as "artificial"). *See also Brereton v. Communications Satellite Corp.*, 735 F. Supp. 1085, 1088 (D. D.C. 1990) ("the great creativity of this argument [by at-will employees] is inversely proportional to the acceptance that it has garnered"). As another court summarized:

> Reinstatement of the identical employment relationship, with the same rights, duties and obligations of the old agreement, is not a new and distinct relation covered by §1981.

Carter v. O'Hare Investors, 736 F. Supp. 158 (N.D. Ill. 1989) (rejecting at-will employee's argument).

Further, the courts below properly interpreted Ohio Revised Code §3319.11. The Ohio Supreme Court

frequently refers to non-renewals under §3319.11 as "terminations." *E.g., Edens v. Barberton Area Family Practice Center*, 43 Ohio St. 3d 176, 179 (1989) (under §3319.11, notice "must be given on or before April 30 of the school year preceding *termination*") (emphasis added); *Struthers City School Board of Education v. Struthers Education Association*, 6 Ohio St. 3d 308, 309 (1983) ("R.C. 3319.11 sets forth certain procedures which must be followed by a board of education when *termination* of a nontenured teacher's employment is contemplated") (emphasis added). This construction by Ohio's highest court should be dispositive of how an Ohio statute operates.

Finally, O.R.C. §3319.11 uses the term "re-employ," which clearly contemplates *continuation* of an *existing* relationship, not entry into a new one. That is exactly what happens upon renewal under §3319.11 — the teacher continues to work under the same terms and conditions, with no renegotiation of employment terms, no creation of a new employment relationship, and no loss of seniority. Further, as the Court of Appeals noted, a limited teaching contract is *automatically* renewed unless the school board takes affirmative action to terminate it under §3319.11.

These undisputed points are fatal to petitioner's claim, because a change in the employment relationship is required before an act constitutes "contract formation conduct." *Patterson* made this clear in the context of promotions:

> [A] lower court . . . should not strain in an undue manner the language of §1981. Only where the promotion rises to the level of an opportunity for a *new and distinct relation* between the employee and the employer is such a claim actionable under §1981.

Patterson, 109 S.Ct. at 2377 (emphasis added). The Seventh Circuit elaborated:

> [T]he focus of inquiry should be on whether the promotion would change the terms of the contractual relationship between the employee and the employer.

Malhotra v. Cotter & Co., 885 F.2d 1305, 1311 (7th Cir. 1989). Because renewal of plaintiff's contract would not have changed *any* terms of her employment relationship, it does not constitute contract formation activity. Accordingly, non-renewal under §3319.11 provides no basis for a §1981 action.

In sum, the issue petitioner raises is principally one of state law, and therefore is not one this Court should grant certiorari to review. Further, the courts below decided the issue correctly, so there is no error for this Court to correct.

CONCLUSION

The Court should deny the petition for a writ of certiorari.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES

STELLA HULL *v.* JERRY SHUCK ET AL.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 90-1671. Decided June 28, 1991

The petition for a writ of certiorari is denied.

JUSTICE WHITE, with whom JUSTICE MARSHALL joins, dissenting.

One of the questions presented in this case is whether the "intracorporate conspiracy" rule, which holds that employees of a single entity cannot conspire with each other, applies to claims brought under 42 U. S. C. §1985(3). We expressly left open that issue in *Novotny* v. *Great American Fed. Sav. & L. Assn.*, 442 U. S. 366, 372, n. 11 (1979).

Here, petitioner alleged that several school district officials engaged in a racially-motivated conspiracy to deprive her of her constitutional rights, in violation of §1985(3). In affirming the District Court's grant of summary judgment in favor of the officials, the Court of Appeals applied the intracorporate conspiracy rule, reasoning that "[s]ince all of the defendants are members of the same collective entity, there are not two separate 'people' to form a conspiracy." 926 F. 2d 505, 510 (1991).

As respondents admit, see Brief in Opposition 6, the decision below conflicts with the decisions of at least two other Courts of Appeals. See *Stathos* v. *Bowden*, 728 F. 2d 15, 20-21 (CA1 1984); *Novotny* v. *Great American Fed. Sav. & L. Assn.*, 584 F. 2d 1235, 1259, and n. 125 (CA3 1978) (en banc), vacated on other grounds, 442 U. S. 366 (1979). I would grant certiorari on question 1 presented in the petition to resolve the conflict.